ONG LIAN OEU

v.

KUWAIT FINANCE HOUSE (MALAYSIA) BHD

HIGH COURT MALAYA, TAIPING
AHMAD NASFY YASIN JC
[BANKRUPTCY NO: 29NCVC-253-06-2012]
24 APRIL 2013

BANKRUPTCY: *Notice - Setting aside - Sum claimed in bankruptcy notice not computed up to date of issue of notice - Debt concerned Islamic banking facilities where interest not chargeable - Whether phrase "with interest quantified up to date of issue of bankruptcy notice" in s. 3(1)(i) Bankruptcy Act 1967 excluded 'late payment compensation' charged on outstanding amounts under Islamic banking facilities - Whether s. 3(1)(i) only applicable to interest charged on judgment debts*

The judgment creditor ('JC') had obtained a judgment in default of appearance against the judgment debtor ('JD') for amounts outstanding under the Islamic banking facilities. Based on the judgment, the JC filed a bankruptcy notice ('BN') against the JD on 11 June 2012. The JD applied to set aside the BN on the ground, *inter alia*, that the amount claimed in the BN was only quantified up to 30 April 2012 and not up to the date of issue of the BN, which was contrary to s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act').

Held (dismissing application):

(1) The judgment was in relation to Islamic banking facilities which did not give the JC the right to claim for interest but only for 'late payment compensation'. The phrase 'with interest quantified up to the date of issue of the bankruptcy notice' in s. 3(1)(i) of the Act did not apply to the present case. Nothing in the language of s. 3(1)(i) suggested that the said provision was wide enough to encapsulate late payment compensation. (paras 7 & 8)

(2) The word 'interest' in the phrase 'with interest quantified up to the date of issue of the bankruptcy notice' under s. 3(1)(i) of the Act ought to be given a strict construction and the word 'interest' ought not to be interpreted to include late payment compensation *vis-a-vis* the Islamic banking facilities. (para 9)

(3) The JC was not obliged to quantify the late payment compensation up to the date of issue of the BN. As the late payment compensation for May and June 2012 could not be ascertained at

A the time of the issue of the BN and therefore could not be made the subject of execution in the present bankruptcy proceedings, the amount quantified in the BN up to 30 April 2012 was the correct sum owing as at the date of filing of the BN and was in accordance with s. 3(1)(i) of the Act. The sum in the BN was clear and
B unambiguous and there was no doubt as to the amount the JD had to pay to avoid committing an act of bankruptcy. (paras 8, 12 & 13)

(4) The judgment in the instant case was a final judgment for a liquidated sum which had not been stayed or set aside and the JC
C was entitled to execute the judgment by way of bankruptcy proceedings. (para 16)

Case(s) referred to:
Adzmi Ali & Anor v. Mohd Isa Kasad [1987] 1 CLJ 445; [1987] CLJ (Rep) 37 SC ***(refd)***
D *Dato' Hj Yusuf Kamari v. CIMB Bank Bhd [2009] 9 CLJ 209 HC* ***(refd)***
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***
J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***
Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***
E *OCBC Bank (Malaysia) Bhd v. Sethu Ambalagara Thevar [1998] 3 CLJ 563 CA* ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam [1993] 3 CLJ 349 SC ***(refd)***
Re Ernest Cheong Yong Yin, Ex P United Malayan Banking Corporation Bhd [2002] 2 CLJ 481 HC ***(refd)***
F *Re Tan Hwee Earn, Ex P the People's Insurance Company (M) Sdn Bhd [1999] 4 CLJ 325 HC* ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
G Bankruptcy Rules 1969, r. 66
Rules of the High Court 1980, O. 13 r. 1(1)

For the judgment debtor - Kuek Wen Jing; M/s Phee, Chen & Ung
For the judgment creditor - Heng Yee Keat; M/s Lee Ong & Kandiah

H *Reported by Ashok Kumar*

I

JUDGMENT

Ahmad Nasfy Yasin JC:

Introduction

[1] This is an application by the judgment debtor *vide* encl. 6, a summons-in-chambers dated 29 June 2012, to set aside the bankruptcy notice dated 11 June 2012 (encl. 3).

[2] The relevant cause papers filed in respect of that application are as follows:

(i) Bankruptcy notice dated 11 June 2012 (encl. 3);

(ii) Summons-in-chambers dated 29 June 2012 (encl. 6);

(iii) Affidavit in support affirmed by the judgment debtor on the 28 June 2012 (encl. 7); and

(iv) Affidavit in reply affirmed by Peter Soo Beng Hoe on 23 July 2012.

Grounds To Set Aside The Bankruptcy Notice Dated 11 June 2012

[3] The judgment debtor has raised the following grounds:

(i) The bankruptcy notice is void under s. 3(1)(i) of the Bankruptcy Act 1967 on the ground that the sum as claimed therein is only quantified up to 30 April 2012 and not up to the date of issue of the bankruptcy notice on 11 June 2012;

(ii) The sum as claimed in the bankruptcy notice ("the bankruptcy sum") is excessive and thus wrong;

(iii) The service of the bankruptcy notice on the judgment debtor was effected on a Sunday and is therefore invalid;

(iv) The judgment which forms the basis of the bankruptcy notice, is not a final judgment under s. 3(1)(i) of the Bankruptcy Act 1967; and

(v) The judgment debtor has a counterclaim, set off or cross demand.

Finding Of Court

[4] Having called for and read the respective submissions, I have dismissed the judgment debtor's application *vide* encl. 6 with costs. I shall now give my grounds.

A **Bankruptcy Sum Quantified Up To 30 April 2012**

[5] The bankruptcy sum is computed in accordance with the terms of the judgment dated 29 March 2012 obtained by the judgment creditor against the judgment debtor at the Kuala Lumpur High Court under Suit No. 22A-1174-11-2011 ("the judgment") which forms the basis of the bankruptcy proceedings herein. (see exh. "KFH'2" to the judgment creditor's affidavit).

[6] Based on the judgment the judgment debtor is required to pay the judgment creditor as follows:

(i) **Kemudahan *Murabahah Tawarruq* (MTQ1)**

RM588,658.94 yang kena dibayar setakat pada 31.10.2011 dengan **gantirugi bayaran lewat pada kadar - R Plaintif** ke atas jumlah sebanyak RM493,173.40 dari 1.11.2011 sehingga tarikh penyelesaian penuh;

(ii) **Kemudahan *Murabahah Tawarruq* 2 (MTQ2)**

RM5,252,737.11 yang kena dibayar setakat pada 31.10.2011 dengan **gantirugi bayaran lewat pada kadar - R Plaintif** ke atas jumlah sebanyak RM5,000,000 dari 1.11.2011 sehingga tarikh penyelesaian penuh;

(iii) **Kemudahan Gabungan**

RM30,374,665.11 yang kena dibayar setakat pada 31.10.2011 dengan **gantirugi bayaran lewat pada kadar - R Plaintif** ke atas jumlah sebanyak RM29,054,466 dari 1.11.2011 sehingga tarikh penyelesaian penuh, dan

(iv) Kos sebanyak RM225.

[7] Having seen the terms of the judgment above, I am of the view that the judgment was granted in relation to the Islamic banking facilities. Thus the judgment does not accord any right to the judgment creditor to claim for interest. In view of this, the judgment creditor is only entitled to claim for "gantirugi bayaran lewat" (late payment compensation), and not interest. As such, contrary to the assertion of the judgment debtor, the judgment creditor is not claiming for interest.

[8] In my considered view the phrase "with interest quantified up to the date of issue of bankruptcy notice" under s. 3(1)(i) of the Bankruptcy Act 1967 ("the Act") does not apply to the present case on the ground that the judgment creditor is not claiming for interest. In other words, the judgment creditor is not obliged to quantify the

'gantirugi bayaran lewat' (late payment compensation) up to the date of issue of the bankruptcy notice as the said provision is only applicable in respect of interest and not "gantirugi bayaran lewat" and there is nothing in language of s. 3(1)(i) to suggest that the said provision is wide enough to encapsulate the late payment compensation. This interpretation is in accord with the normal rule of interpretation relating to bankruptcy proceedings and in this regard reference may be made to the case of *Ĵ Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104, at p. 116; [2000] 3 MLJ 177, where the Court of Appeal held at p. 188:

> **In our judgment, the following propositions may be distilled from a rationalisation of the authorities we have thus for discussed**.
>
> (1) **When determining an issue under the Act (Bankruptcy Act 1967) it is incumbent upon the court to accord its provisions a strict construction**. (emphasis added).

[9] Therefore, to my mind, the word "interest" in the phrase "with interest quantified up to the date of issue of the bankruptcy notice" under s. 3(1)(i) of the Act ought to be given a strict construction. As such, the word "interest" ought not to be interpreted to include late payment compensation *vis-a-vis* the Islamic Banking facilities.

The Judgment Creditor's R-Rate For May And June 2012 Was Not Available At The Time Of Filing Of The Bankruptcy Notice

[10] Having referred to the judgment above, I am of the view that the late payment compensation as ordered in the judgment is to be calculated based on the judgment creditor's R-Rate, as follows:

(i) The judgment creditor's R-Rate is calculated based on its twelve months' gross profit which only known about two weeks after the end of the relevant month.

(ii) It follows that the judgment creditor's R-Rate is only available about two weeks after the end of the relevant month.

(iii) Accordingly, the judgment creditor's R-Rate for April 2012 was only known in mid May 2012. Similarly, the judgment creditor's R-Rate for June 2012 would only be known in mid July 2012.

[11] In the present case, the bankruptcy notice was filed and issued on 11 June 2012. At the time of filing on 11 June 2012, the judgment creditor's R-Rate was only available up to April 2012. In other words, at the time of filing, the judgment creditor's R-Rate for May 2012 was

A not known. It was only known in mid June 2012 and similarly the judgment creditor's R-Rate for June 2012 would only be known in mid-July 2012. Hence, I accept the submissions of the judgment creditor that the late payment compensation could and should only be calculated up to 30 April 2012. In *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ B 400; [1987] CLJ (Rep) 172; [1988] 1 MLJ 263, the Supreme Court held at p. 176 (CLJ); p. 265 (MLJ):

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution. See in *re Woodall, ex parte Woodall* [1884] 13 QBD 479. If part of the debt C has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance. See *Re A Debtor* [1983] 2 ALL ER 824. *Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution.* In the present case, as at the date of issue of the bankruptcy notice, only in respect of that part of the judgment debt of $2,325,000.00 the creditor could have D issued execution. The remaining parts of the judgment debt quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of executions. *In our view, the demand for payment of interest was only after the issue of the notice ie, when the creditor's petition was issued on January, 1986 that the creditor was able to ascertain the base lending rate of 10.25% per annum*, and also to quantify the costs at $9,880.50 after taxation. E Clearly, the bankruptcy was bad in law as it contained demand payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with F the demand to pay such unascertained sums cannot constitute an act of bankruptcy. *The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice.* (emphasis added)

G The above quoted passage in *Low Mun* was quoted with approval and applied by the Court of Appeal in the cases of *J Raju M Kerpaya (supra)* at pp. 183 & 184 and *OCBC Bank (Malaysia) Bhd v. Sethu Ambalagara Thevar* [1998] 3 CLJ 563 at pp. 570 & 571; [1998] 3 MLJ 769, at pp. 774 & 775.

H **[12]** Looking at the present situation in its proper context it is clear that it was only after the issue of the bankruptcy notice that the judgment creditor was able to ascertain the judgment creditor's R-Rate (that is the basis for computation of the late payment compensation) for both the months of May and June 2012. As such at the time of filing I on 11 June 2012, the late payment compensation for 1 May 2012 to 11 June 2012 could not be quantified and was incapable of being made

the subject of execution in the present bankruptcy proceedings. Thus, the bankruptcy sum which is quantified up to 30 April 2012 is the correct sum owing as at the date of filing of the bankruptcy notice on 11 June 2012 and in accordance with s. 3(1)(i) of the Act. In any event the judgment debtor's argument ignores the fact that the judgment sum that must be satisfied is clear and unambiguous.

Waiver Of Late Payment Compensation From 1 May 2012 To 11 June 2012

[13] I am in full agreement with the submission of the judgment creditor's counsel that in view of foregoing and to avoid any ambiguity on the amount that the judgment debtor has to pay, for the purpose of the bankruptcy notice, the judgment creditor is deemed to have waived its claim for late payment compensation calculated at the judgment creditor's R-Rate from 1 May 2012 to 11 June 2012. Hence there is no doubt at all on the amount which the judgment debtor has to pay in order to avoid the commission of an act of bankruptcy.

(See *Re Ernest Cheong Yong Yin, Ex P United Malayan Banking Corporation Bhd* [2002] 2 CLJ 481).

The Bankruptcy Sum Is Calculated In Accordance With The Terms Of The Judgment

[14] The statement of account exhibited as "KFH-4" in the judgment creditor's affidavit in my view shows that the computation of bankruptcy sum is correct. As such, the judgment debtor's allegation that the bankruptcy sum is excessive is unsupported by evidence and is therefore unsustainable. (see *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324; [1993] 2 MLJ 298).

The Service Of The Bankruptcy Notice On Saturday

[15] It is no doubt that the bankruptcy notice was personally served on the judgment debtor on 23 June 2012 which was a Saturday and the judgment debtor has admitted the same. In *Dato' Hj Yusuf Kamari v. CIMB Bank Bhd* [2009] 9 CLJ 209 a similar argument was raised in that the service which was effected at 5.50pm on 2 February 2008, which was a Saturday, violates r. 66 of the Bankruptcy Rules 1969. It was argued that r. 66 allows service on week-days and at certain times on those week-days, that is before half-past three in the afternoon. When it comes to weekly holidays, no service is allowed on such days. Mary Lim J had no difficulty in rejecting the said argument. Her Ladyship wrote, and I agree:

A It is obvious that r. 66 makes no mention of the day of service. It only mentions the time of service. The rule itself also specifies that where service is effected after the 'cut-off' hours of 12 noon or half-past three in the afternoon then such service "for the purpose of computing any period of time subsequent to such service" shall be deemed to have been effected on the day following the weekly holiday or on the
B following day, as the case may be. The 'cut-off' hours are for the purpose of computing time and no other purpose. To give it the meaning as suggested by learned counsel may lead to absurdity. If his argument is correct, it may mean there can never be any violation of r. 66 since this rule only prescribes the hour after which service cannot be effected. It does not prescribe the hour before which service
C can be effected. In which case, service after 12 noon on a Saturday is still good service before 12 noon of a Sunday or good service of a Monday and it goes on. Obviously, this cannot be the case.

The Judgment Is A Final Judgment Under s. 3(1)(i) Of The Act

D **[16]** In the present case the judgment was entered in default of appearance under O. 13 r. 1(1) of the Rules of the High Court 1980. Thus it was a final judgment (see *Adzmi Ali & Anor v. Mohd Isa Kasad* [1987] 1 CLJ 445; [1987] CLJ (Rep) 37; [1987] 2 MLJ 199, *Re Tan Hwee Earn, Ex P the People's Insurance Company (M) Sdn Bhd* [1999] 4
E CLJ 325; [1999] 4 MLJ 248). Applying the principle decided in the above cases in the present case, I am of the view that the judgment is for a liquidated sum and thus the judgment is a final judgment for the purpose of the bankruptcy proceeding herein. More so the judgment has not been stayed or set aside. In the event the judgment creditor is
F legally entitled to execute the judgment by way of the bankruptcy proceeding herein.

No Counter Claim, Set Off Or Cross Demand By The Judgment Debtor

G **[17]** The counsel for judgment debtor alleged that the judgment debtor has counterclaim, set off or cross demand against the judgment creditor. To my mind this is a mere allegation without quantifying the same in terms of money and without condescending to particulars of the same. Thus such allegation has no basis and unsustainable (see *Perwira Habib*
H *Bank Malaysia Bhd v. Samuel Pakianathan Jabamanickam* [1993] 3 CLJ 349; [1993] 2 MLJ 423).

Conclusion

[18] Based on the reasons adumbrated above, I hereby dismissed
I encl. 6 with costs.